No. 15740

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACQUES ARTHUR GUBBELS,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director, Immigration and Naturalization Service, Los Angeles, California,

Appellee.

APPELLEE'S BRIEF.

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Jurisdiction of the Court.

This is an appeal from a judgment of the court below in an action for judicial review of an order of deportation. [Tr. 17-21.] Jurisdiction was invoked pursuant to 28 U.S.C. 2201, 5 U.S.C. 1009 [Tr. 3], and 8 U.S.C. 1329. Since the Order of the Court below was a final decision, this court has jurisdiction of an appeal from that decision pursuant to 28 U.S.C. Sec. 1291.

Statement of the Case.

Appellant, a 22-year-old native of Belgium and citizen of the Netherlands, arrived in the United States with his parents February 3, 1948, at the age of 12, and was admitted for permanent residence. In 1952 he enlisted in the United States Army. On September 13, 1954, while serving in Germany, he was convicted of two offenses.

The first offense of which he was convicted by court-martial was larceny, a violation of Article 121 of the Uniform Code of Military Justice, in that he did at Rohrnbach, Germany, on March 16, 1954, steal a pistol which was the property of the United States and of a value of more than $50. The second offense was robbery, a violation of Article 122 of the Uniform Code of Military Justice, in that at Landshut, Germany, on August 2, 1954, by force and violence, and against the will of the owner, he stole an automobile of a value more than $50. He was sentenced to dishonorable discharge and confinement for five years. He was thereafter incarcerated in the federal correctional institution at Terminal Island, California, and on September 29, 1956, was paroled.

The action below was for review of a final administrative deportation order pursuant to hearings after warrant of arrest. The warrant charged that the plaintiff was subject to deportation pursuant to Sec. 241(a)(4) of the Immigration and Nationality Act of 1952 [8 U.S.C. 1251(a)(4)], in that at any time after entry he has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

The District Court upheld the validity of the deportation order, and its opinion [Tr. 12-17] is reported at 152 F. Supp. 277.

Questions Presented.

1. Does the judgment of the court-martial constitute a "conviction" within the meaning of the deportation statute [8 U.S.C. 1251(a)(4)]?

2. Do the two crimes of which appellant has been convicted involve moral turpitude?

Statutes Involved.

Provisions of Sec. 1251(a)(4) of the Nationality Act read as follows:

§ *1251. Deportable Aliens—General Classes*

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— * * *

"(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether the convictions were in a single trial;

* * * * * * * *

"(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply * * *

"(2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Servic and prosecution authorities, who shall be granted an opportunity to make representations in the matter. * * *"

Articles 121 and 122 of the Uniform Code of Military Justice (formerly 50 U.S.C. 715, 716; now 10 U.S.C. 921, 922) read as follows:

"§ 715. Larceny and wrongful appropriation (article 121)

"(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means whatever, from the possession of the true owner or of any other person any money, personal property, or article of value of any kind—

"(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner, steals such property and is guilty of larceny; or

"(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner is guilty of wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct."

* * * * * * * *

"§ *716. Robbery (Article 122)*

"Any person subject to this chapter who with intent to steal takes anything of value from the person or in the presence of another, against his will, by means of force or violence or fear of immediate or future injury to his person or property of a relative or member of his family or of anyone in his company at the time of the robbery, is guilty of robbery and shall be punished as a court-martial may direct."

Herein, the Uniform Code of Military Justice, 50 U.S.C. 551-736 (1952 edition), 64 Stat. 108, Act of May 5, 1950, now recodified at 10 U.S.C. 801-940, 70A Stat. 36, Act of August 10, 1956, is cited as "UCMJ."

The Manual for Courts-Martial, prescribed by Executive Order No. 10214, February 8, 1951, 16 FR 1303 is cited as "MCM."

Summary of Argument.

I.

CONVICTION BY A COURT-MARTIAL CONSTITUTES A CONVICTION WITHIN THE MEANING OF THE DEPORTATION STATUTES.

A. The "Executive Instrumentality" Concept Is Not Valid Because a Court-martial Is Not a Mere "Instrumentality" of the Executive.

B. "Executive Instrumentality" Theory Suffers Final Defeat With Creation of Uniform Code of Military Justice.

C. Military Tribunals Constitute a Parallel System to the State and Federal Courts and Are Accorded Equal Dignity.

D. Court-martial Organization and Practice Is Appropriately Judicial.

E. The Necessary Recommendation Under the Statute Can Be Made.

F. There Is No Basis for Contention That Appellant's Court-martial Convictions Might Not Have Been Convictions in California.

II.

APPELLANT HAS BEEN CONVICTED OF TWO OFFENSES INVOLVING MORAL TURPITUDE.

ARGUMENT.

I.

Conviction by a Court Martial Constitutes a Conviction Within the Meaning of the Deportation Statutes.

The first question presented to this court is whether the judgment of the court-martial constitutes a conviction within the meaning of the deportation statutes [8 U.S.C. 1251(a)(4)]. The record shows clearly that appellant was in fact convicted by the court-martial of two crimes. The only question which can remain then, is whether the convictions suffered by appellant are somehow outside the meaning of "conviction" used in the statute.

Appellant cannot contend that he was convicted by the wrong type of court, for the statute makes no exception or distinction among types of tribunals rendering the conviction.

He is thus forced to create the argument that the court-martial is not a court. He contends that its function is not judicial, and therefore his convictions are not in fact convictions according to ordinary definitions and usage of the word. He alleges this theory despite the fact that these convictions actually placed him in a federal prison.

A. The "Executive Instrumentality" Concept Is Not Valid Because a Court-martial Is Not a Mere "Instrumentality" of the Executive.

Appellant must base his contention on the concept of courts-martial as an "executive instrumentality" in contrast with "Judicial instrumentality."

United States military history shows the existence of this old and now discredited theory that courts-martial

are merely instrumentalities of an executive agency, and that they exist merely to aid the military in establishing discipline. This concept was born among the American military in the post-Civil War era, and was soon denounced by the United States Supreme Court, *Runkle v. U. S.,* 122 U. S. 543. However, as it seemed to justify the then existing practices in the armed forces, it died a slow and hard death, and has since provoked academic discussion.

The accepted concept as pronounced by the Supreme Court is this: Courts-martial are instrumentalities created by legislative authority for the performance of a judicial function, and are not merely instrumentalities of the executive power for the enforcement of discipline.

It would seem without question that the purpose and function of a court-martial is the achievement of justice in the case before it. This achievement will certainly have as a by-product, a salutary effect upon discipline and morale. It is this by-product which led to the misconception of the nature of courts-martial. The genesis of the erroneous executive instrumentality concept has been traced to a misunderstanding of the holding by the United States Supreme Court in *Dynes v. Hoover,* 20 Haw. 65 (1858). In this case the Court stated that courts-martial were not to be classed with courts established under Article III of the Constitution. It then went on to point out that courts-martial were established by legislative authority contained in Article I of the Constitution. To the contrary of holding that courts-martial are not courts as that term is used in the usual sense, this case stands for the proposition that they are judicial in nature and are included in the judicial process.

Nineteen years after *Dynes v. Hoover,* the United States Supreme Court made it crystal clear that court-martial proceedings must be classified as judicial as contrasted with executive. This clear and unequivocal holding is set forth in *Runkle v. United States* (1887), 122 U. S. 543, 557; 7 S. Ct. 1141. However, during the period of time between *Dynes v. Hoover* and *Runkle v. United States,* the well known and much followed Winthrop treatise on courts-martial was published. In this work the author set forth at length the theory that courts-martial are not judicial in nature, but merely an executive instrumentality. See: *Winthrop, Military Law and Precedents,* page 54. Later commentators have observed that Col. Winthrop attempted to justify the existing army courts-martial practice by classifying it under the implied powers of the President. See *James W. Snedeker, "Military Justice under the Uniform Code,"* pages 43-48. This concept, together with an analogy to the British system of military justice, led to confusion as to the character of the American court-martial. As General Snedeker points out, the analogy to the British system overlooks the fact that the United States has a written Constitution, in which the power to make rules for the Government including provisions for the internal judicial process of the Armed Forces is placed in legislative, not executive hands as it is in Britain.

The holding of *Runkle v. United States (supra)* left no doubt that the executive instrumentality theory should be laid to rest. In this case the court set aside a court-martial conviction which had been approved in an administrative manner by the appropriate executive department head. The court said:

> "There can be no doubt that the President, in the exercise of his executive power under the Constitu-

tion, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his executive duties, and their official acts promulgated in the regular course of business, are presumptively his acts. That has been many times decided by this Court. (Citations.)

"Here, however, the action required of the President is judicial in its character, not administrative. As Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. * * *" "* * * And this because he is the person, and the only person, to whom has been committed the important judicial power of finally determining on the examination of the whole proceedings of the court-martial, * * *."

" 'Undoubtedly the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. *The whole proceedings from its inception is judicial. The trial, finding, and sentence are solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law.* * * * When the President, then, performs his duty on approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law.' " (Emphasis added.)

B. "Executive Instrumentality" Theory Suffers Final Defeat With Creation of Uniform Code of Military Justice.

Congress finally wrote finish to the old executive instrumentality theory when in 1950 it enacted the Uniform Code of Military Justice. It was under this law that the appellant herein was tried and convicted of both violations. In this legislation, Congress provided for a court of military appeals. UCMJ, Art. 67(a). It provided an annual review of sentence policies of the armed forces, UCMJ, Art. 67(g); and specifically withheld final control from the executive by providing that the procedural regulations prescribed by the President be reported to Congress. UCMJ, Art. 36(b).

Then, completely exploding any remaining vestiges of the idea that court-martial trial of soldiers exists primarily to maintain discipline and is incidental to the Army's primary fighting function, Congress specifically provided for punishment of commanding officers who admonish or otherwise attempt unlawfully to influence the action of courts-martial. UCMJ, Arts. 37 and 98.

C. Military Tribunals Constitute a Parallel System to the State and Federal Courts, and Are Accorded Equal Dignity.

In rationalizing the theory that courts-martial are really not courts at all within the purview of 8 U.S.C. 1251(a)(4), emphasis is laid on various points of distinction between military courts and civil courts. Such differences no more place the courts-martial outside the definition of courts within the meaning of the statute than do the distinctions between federal, state, and local courts place any of them outside the bounds of the judicial system.

Judge Byrne in his holding below said:

> "To support his contention that Congress did not intend that court-martial convictions should be included within the meaning of 'convictions' as used in Sec. 241(a)(4), Gubbels points to the distinctions between military tribunals and civil courts with particular emphasis on the right to jury trial in a civil court. Most of these distinctions are real, but they do not aid in the resolution of this problem. The distinctions are well known to Congress and had it desired to write them into the Act it would have done so. No distinction was made between 'convictions' in jury trial and 'convictions' in court trial, just as no distinction was made with respect to 'convictions' in federal, state, territorial and military courts."

Granted that courts-martial are not strictly "courts of the United States" within the authority of Article III, it must be observed that neither are many of the other courts which are empowered to impose punishment for violations of criminal codes. For example, none of the courts of general criminal jurisdiction of any of the forty-eight states derive their powers from Article III of the Constitution. The criminal courts of the various territories of the United States and the District Courts of those territories are constituted not under Article III, but under Article IV, although their functions are substantially similar to the Article III courts. Congress established these territorial courts under its constitutional powers as it did the military courts-martial.

The fact that these non-Article III courts are part and parcel of the judicial system is not questioned. Neither can it be seriously contended that convictions of these courts do not in fact constitute convictions for the purposes of the Immigration and Nationality Act.

Just as judgments from courts of the state system are accorded the same dignity as those of the federal system, the judgment of the courts-martial system long have been accorded the same dignity and finality as those of other tribunals. In *Grafton v. United States,* 206 U. S. 333 (1907), the Supreme Court held that a soldier having been acquitted of homicide by a court-martial, could not then be tried by a civil territorial court. Such action would put him in double jeopardy. The court stated at page 345:

> "It is alike indisputable that if a court-martial has jurisdiction to try an officer or soldier for a crime, its judgment will be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance. In *Ex parte Reed,* 100 U. S. 13, 23, the court referring to a court-martial, said: 'The court had jurisdiction over the person and the case. It is the organism provided by law and clothed with the duty of administering justice in this class of cases. Having had such jurisdiction, its proceedings cannot be collaterally impeached for any mere error or irregularity, if there were such, committed within the sphere of its authority. Its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under like circumstances.'
>
> "But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in *the same or in another court, civil or military, of the same government.*" (Emphasis added.)

It is thus clear that even decades before Congress codified it with finality in the Uniform Code of Military Justice, the United States Supreme Court followed the pronouncements of *Dynes v. Hoover* and *Runkle v. United* States (supra) in recognizing the true character of the court-martial as a tribunal of competent jurisdiction within the judicial process.

It should be observed that the *dicta* of Justice Black in *U. S. ex rel. Toth v. Quarles,* 350 U. S. 11, as quoted by appellant was written in a case involving the trial by court-martial of civilians. The issue there has no bearing on the issue here. *Dicta* in cases involving issues of Constitutional law must be considered in the context of the issue before the court, and the application of the same must be so limited. *Cohens v. Virginia,* 6 Wheat. 264, 398. For example, on *Toth's* own issue the recent Ninth Circuit Court of Appeals case of *Lee v. Madigan,* 248 F. 2d 783 (Dec. 7, 1957), upheld the power of a court-martial to try a civilian for conspiracy to commit murder, the offense having been committed while he was serving a court-martial sentence.

The Supreme Court, as indicated in *Burns v. Wilson,* 346 U. S. 137, regards the military system as a parallel system to the state courts and the federal constitutional courts. Justice Vinson speaking for the court stated:

> "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights. In military cases, it would be in disregard of the statutory scheme if the federal civil courts failed to take account of the prior proceedings,—of the fair determinations of the military tribunals after all military remedies have been exhausted. * * *"

It should be noted that appellant served his sentence in the Federal Correctional Institution at Terminal Island, California. This is one unit of the federal prison system to which are sent all persons convicted in the federal court system. It is clear that as a matter of practice, as well as theory, the judgments of the courts-martial are accorded the same dignity and recognition as those of any other court under the federal system.

D. Court-Martial Organization and Practice Is Appropriately Judicial.

The argument that the court-martial is not a court in the true sense of the word because of its membership, or the method prescribed by law for the appointment of its members, fails completely in the revealing light of facts. The American jury has never been considered less than free because of the particular occupations of its members. or because the jury panel was constituted and called to service by officers of the court. The legislatively prescribed method for the appointment of members of the court-martial does not transform the organized court-martial into a subordinate agency of the appointing authority any more than the appointment of a federal judge by the President results in making that judge's court an arm of the executive branch of the government.

Once organized as a court-martial, it functions as any court in the state systems or federal constitutional system with painstaking rules and precautions designed to guarantee achievement of its goal to render justice. As stated by the Supreme Court in *Burns v. Wilson*, 346 U. S. 137, upon discussing the Uniform Code of Military Justice:

> "Rigorous provisions guarantee a trial as free as possible from command influence, the right to prompt arraignment, the right to counsel of the accused's own

choosing, and the right to secure witnesses and prepare an adequate defense. The revised Articles and their successor—the new Code—also establish a heirarchy within the military establishment to review the convictions of courts-martial, to ferret out irregularities in the trial, and to enforce the procedural safeguards Congress determined to guarantee to those in the nation's armed services. And finally Congress has provided a special post-conviction remedy within the military establishment, apart from ordinary appellate review, whereby one convicted by a court-martial may attack collaterally the judgment under which he stands convicted.

"* * * Indeed, Congress has taken great care both to define the rights of those subject to military law, and provide a complete system of review within the military system to secure those rights."

See also:

United States v. Clay, 1 U.S.C.M.A. 74, 81; 1 C.M.R. 74, 81.

E. The Necessary Recommendation Under the Statute Can Be Made.

The allegation is made that courts-martial are not equipped to make the recommendation to the Department of Justice that the alien be relieved from liability to deportation, as provided in 8 U.S.C. 1251(b), *supra,* therefore they cannot be courts whose convictions come within the purvue of the statute.

The section provides that the recommendation may be made by the "court" sentencing the alien at the time of first imposing judgment, at the time of sentence, or within 30 days thereafter.

Two points should be discussed hereunder. First, it should be pointed out that the record shows no indication that appellant ever made application to anyone for a recommendation to the Department of Justice that he be relieved from liability of deportation. As the statute leaves the recommendation entirely to the discretion of the court, it cannot be known whether appellant's situation was such as to even merit such a recommendation.

Appellant, having failed and neglected to test the machinery he now analyzes, cannot now come before this court and seriously contend that said machinery is defective.

Secondly, the necessary recommendation under the statute can be made. Though no case is found wherein the question previously has arisen, nothing prevents an alien from requesting the recommendation from proper military authorities. In fact, the procedures afford many opportunities for an alien so situated to have his request heard by authority having the same powers over the case as possessed by the criminal court authorized to make the recommendation. As a practical matter, the alien may be afforded more opportunities and a longer period in which to have his request considered than he might in the civil courts. In the court-martial procedure the powers of the ordinary criminal court are split among the court-martial, the convening officer, and appellate authorities. Within the upper limits of severity imposed by the court-martial, the convening officer and appellate authorities have full sentencing power. *United States v. Atkins,* 8 U.S.C.M.A. 77, 23 C.M.R. 301; *United States v. Speller,* 8 U.S.C.M.A. 24 C.M.R. 173. This gives the alien various opportunities to procure the recommendation "at the time of first imposing judgment or passing sentence, or within thirty days thereafter" as provided by the statute.

In military law a judgment of conviction is not final in the sense that a criminal conviction is considered final when pronounced by the ordinary criminal court. Military procedure is designed to provide various checks on the initial verdict. Thus the conviction is final and sentence may be ordered into execution only when the appellate processes have been completed. The appellate procedures are but continuations of the initial trial.

Jackson v. Taylor, 353 U. S. 569;

Fowler v. Wilkinson, 353 U. S. 583;

UCMJ, Arts. 44, 71c;

U. S. v. Padilla and Jacobs, 1 U.S.C.M.A. 603, 5 C.M.R. 31.

The opportunities afforded the alien are well demonstrated by these details of court-martial procedure:

(1) After a finding of guilt, the court-martial reconvenes and hears evidence preparatory to passing upon sentence. Virtually any evidence and argument concerning mitigation or extenuation of the offense is heard before sentence is determined.

U. S. v. Strand, 6 U.S.C.M.A. 397, 20 C.M.R. 13;

U. S. v. Blau, 5 U.S.C.M.A. 232, 17 C.M.R. 232.

At that point, nothing prevented appellant from requesting the recommendation, or having it made part of a recommendation for clemency which might otherwise have been forthcoming from the court-martial in the manner authorized. MCM 1951, Par. 77. See also *U. S. v. Doherty,* 5 U.S.C.M.A. 287, 17 C.M.R. 287.

(2) After announcement of sentence by the court-martial itself in all general court-martial cases (appellant having undergone general court-martial) the sentence must

be reviewed and acted upon by the officer who convened the court-martial. *UCMJ,* Articles 61, 64 and 65. He must cause an impartial written opinion and report to be made. The report is similar to the pre-sentence or probation report made prior to sentence in the United States District Courts. *U. S. v. Coulter,* 3 U.S.C.M.A. 657, 14 C.M.R. 75. At this point again, appellant could have submitted whatever he desired for consideration of the convening officer. *U. S v. Lanford,* 6 U.S.C.M.A. 371, 20 C.M.R. 87. After considering the above report, the convening officer promulgates the results of trial and the sentence. He must approve or disapprove the findings and sentence, and can be said to have almost complete sentencing power within the upper limits of severity of the sentence determined by the Court-martial. *U. S. v. Speller, supra.*

(3) All general court-martial cases resulting in serious punishments must be further reviewed by a Board of Review in the Office of the Judge Advocate General. UCMJ, Arts 66, 71(c). Once again, appellant had ample opportunity to address either the Judge Advocate General or the Board of Review, or both on the matter of deportation and procurance of the appropriate recommendation. See: 32 CFR 61.9(f), last sentence.

(4) Upon affirmance by the Board of Review of the conviction and sentence as both legal and appropriate, if no recommendation were forthcoming from the Judge Advocate General, appellant might have appealed to the Secretary of the Army on the matter of deportation. The Secretary exercises broad clemency powers over court-martial convictions. *UCMJ,* Art. 74.

(5) The conviction is made "final" when the final order is made directing the execution of the sentence, *UCMJ,*

Arts. 66(e), 71(e); *MCM,* paragraphs 90b(2), 100b, 107; after leave to appeal to the Court of Military Appeals expires. *UCMJ,* Arts. 58, 67(b)(3).

It should be observed that there is no difference in these procedures whether there is a plea of guilty or not guilty, although convictions on pleas of guilty are amenable to quicker disposition.

If it be assumed that the 30-day statutory period for the recommendation begins to run after the conviction is legally "final," then it would run from the final order directing the execution of sentence. Although the court-martial is an *ad hoc* body, the convening officer and appellate authorities are continuing institutions exercising powers ordinarily possessed by the usual criminal court. It is thus apparent that the proper recommendation might be made at any step in the court-martial procedure beginning from the point of the first verdict of the court-martial, up to and subsequent to the order directing the execution of the sentence.

F. There Is No Basis for Contention That Appellant's Court-martial Convictions Might Not Have Been Convictions in California.

In support of his major premise, appellant alleges that if he had been tried in the State of California instead of by court-martial, he might not have had any criminal proceedings against his record, and consequently there would be no basis for deportation. This, of course, is at best pure speculation, and even if assumed true, would not be persuasive as to his premise.

However, there is no need to delve further into its ramifications, as the allegation itself is not correct. Appellant was nineteen years old when he committed the offenses

of which he was convicted. The juvenile court has original jurisdiction up to the age of eighteen years of age only, and even as to juveniles under eighteen years, the juvenile court need not accept jurisdiction. Hypothetically, any juvenile in the 19 to 21 age group may be certified to the juvenile court, and the juvenile court may accept jurisdiction. However, by established practice and precedent, this is done only in rare cases of juveniles who have just turned eighteen, and who are inordinately immature and inexperienced. Furthermore, it is limited to offenses falling within the lesser areas of crime wherein no particular criminal intent is demonstrated. Juveniles involved in crimes of force and violence as was the appellant remain under regular criminal divisions.

II.

Appellant Has Been Convicted of Two Offenses Involving Moral Turpitude.

Appellant has been convicted of two offenses under the Uniform Code of Military Justice. The first offense was a violation of Article 121, entitled Larceny and Wrongful Appropriation. The second offense was a violation of Article 122, entitled Robbery.

It should be observed that Article 121, *supra,* includes two separate offenses. The second offense is omitted in appellant's quotation of the Article; thus the Article in its entirety is set forth as follows:

> *"§ 715. Larceny and wrongful appropriation (article 121)*
>
> "(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means

whatever, from the possession of the true owner or of any other person any money, personal property, or article of value of any kind—

"(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner, steals such property and is guilty of larceny; or

"(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate the same to his own use or the use of any person other than the true owner is guilty of wrongful appropriation.

"(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct."

The legislative history, the Manual for Courts-Martial prescribed under the UCMJ, and the case decisions in the appellate courts of the military system make the meaning of the provisions in question absolutely clear.

The elements of the two offenses "Larceny" and "Wrongful Appropriation" contained in Article 121 are identical except for the degree of intent required to be proved. Larceny requires the criminal acts to be done with intent to permanently deprive another of property, while Wrongful Appropriation requires only the intent to temporarily deprive another of the property. The more serious offense statutorily termed "larceny" and defined succinctly as the "taking, obtaining, or withholding" of property, etc., with the requisite intent, is merely the codification of the three offenses known at common law as larceny, obtaining by false pretenses, and embezzlement. (Until the enactment of the UCMJ, military law was still plagued with

those ancient technicalities.) Under the UCMJ pleading the word "steal" covers all forms of larceny. Likewise the words "wrongfully appropriate" covers all forms of the lesser offense of Wrongful Appropriation.

U. S. v. Norris, 2 U.S.C.M.A. 236, 8 C.M.R. 36;

U. S. v. Aldridge, 2 U.S.C.M.A. 330, 8 C.M.R. 130;

U. S. v. Buck, 3 U.S.C.M.A. 341, 12 C.M.R. 97;

U. S. v. May, 3 U.S.C.M.A. 703, 14 C.M.R. 121;

U. S. v. Geppert, 7 U.S.C.M.A. 741, 22 C.M.R. 205;

U. S. v. McFarland, 8 U.S.C.M.A. 42, 23 C.M.R. 466;

MCM, paragraph 200, pages 356-364;

Hearings, House Comm. on Armed Services, 81st Cong., 1st Session, on H.R. 2498, page 1232.

There is a great difference in the maximum penalty between "Larceny" and "Wrongful Appropriation." Larceny of property of over $50.00 in value carries a maximum term of confinement of five years, while wrongful appropriation of the same property (other than a motor vehicle) has a maximum of only six months. *MCM, Table of Maximum Punishments,* page 223.

Even in the lesser offense of Wrongful Appropriation, the element of criminal intent is required, and the element of fraud permeates the whole offense. *U. S. v. Geppert, supra.*

Clearly, appellant's argument that an innocent act devoid of criminal intent could be punishable under Article 121 is without merit.

The other offense of Appellant was a violation of UCMJ Article 122, titled "Robbery." The offense under this article is the same as the crime of robbery known to all other criminal jurisdictions.

MCM, paragraph 201, pages 363-364;

U. S. v. Rios, 4 U.S.C.M.A. 203, 15 C.M.R. 203;

U. S. v. Cunningham, 6 U.S.C.M.A. 106, 19 C.M. R. 232;

U. S. v. Butler (Navy BR), 16 C.M.R. 419;

U. S. v. Tamaro (Air Force BR), 16 C.M.R. 610.

The maximum term of confinement imposable for a violation of Article 122 is ten years. *MCM, Table of Maximum Punishments,* page 223.

The violation of either section thus involves moral turpitude. The Supreme Court has determined that offenses containing an inherent fraud element involve moral turpitude. *Jordon v. de George,* 341 U. S. 223 (1951).

It has also been held that theft, except in unusual circumstances, is a crime involving moral turpitude. *U. S. ex rel Rizzo v. Kenney,* 50 F. 2d 418.

Moral turpitude is defined as an act of baseness, vileness, or depravity in private and social duties owing to fellowmen, or society in general, contrary to accepted moral standards and customary rules.

Mg Sui Wing v. U. S., 46 F. 2d 755, 756;

U. S. ex rel. Manzella v. Zimmerman, 71 F. Supp. 537.

It is clear that stealing a pistol worth more than $50.00, the property of the United States, and robbing an individual of his automobile by force and violence, is contrary to accepted moral standards.

A similar court-martial conviction has been given full effect under New York law.

Florance v. Donovan, 126 N. Y. S. 2d 642, *affd.* 121 N. E. 2d 535.

The Immigration Act of 1952 makes no changes in the law in regard to "conviction" as provided by the Immigration Act of 1917 as Amended. However, the 1952 Act does eliminate any provision that the conviction must occur "in this country." This change validates convictions of military crimes in Germany as here, and would appear to have been instituted for that very purpose of covering military crimes in any locality wherein the armed forces are located.

Conclusion.

As the privilege of living in the United States is much sought after, deportation is generally viewed with appropriate seriousness. However, opportunity to enter this country for permanent residence has always been considered a privilege, and Congress has seen fit to restrict the blessing to those persons who will establish themselves as good citizens. As an implementation of this philosophy, the deportation provisions in question here were set forth by statute. It is not unreasonable to expect appellant to live as a law-abiding citizen the same as any other person.

He cannot now avoid the consequences of his reprehensible acts by taking refuge in technicalities.

We therefore submit that the judgment of the District Court upholding the validity of the Order of Deportation should be affirmed.

Respectfully submitted,

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